



Hong Kong



San Francisco



Seattle



Long Beach



Alaska

The Carrot And The Stick

Compliance Programs As A Benefit To Prevention

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Keesal, Young & Logan



When someone offers a carrot and stick, they offer an incentive to do something, combined with the threat of punishment if you don't do it.

US Pollution Liabilities:

Accidents, Mistakes &
Intentional Discharges –

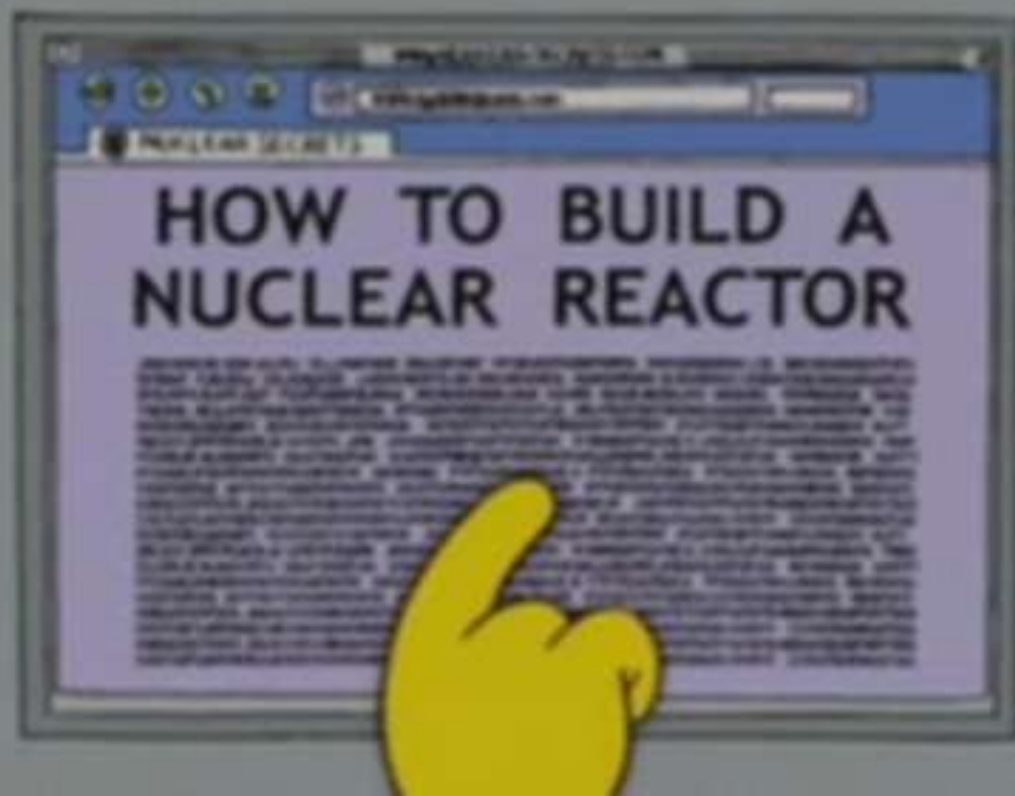
Is There Really A Difference?

Accidents, Mistakes & Intentional Discharges – Is There Really A Difference?



Springfield Nuclear Power Plant





But You Are No Better Than Your
Worst Employee.



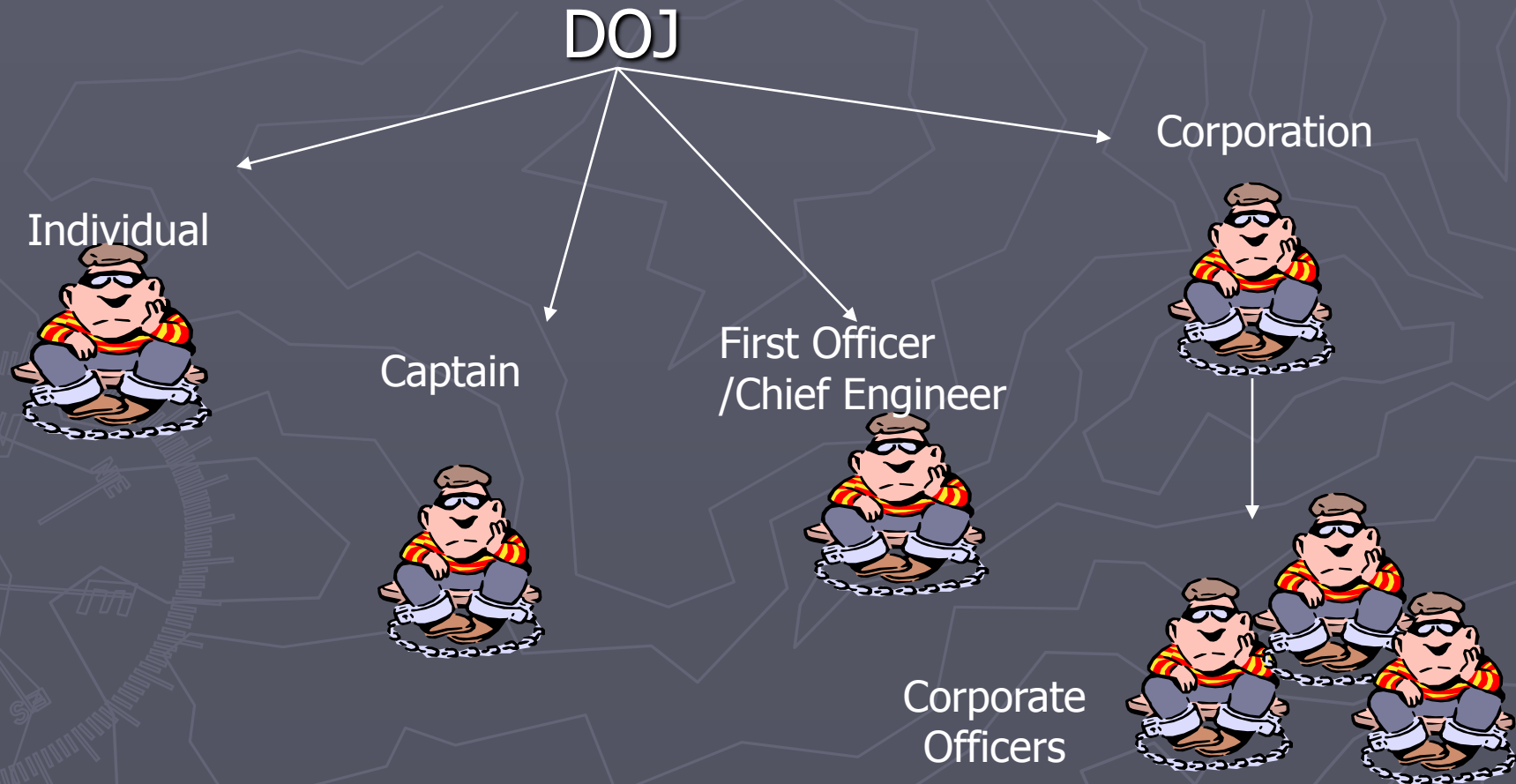
U.S. Federal Laws

- ▶ Oil Pollution Act 1990 (OPA'90)
- ▶ Act to Prevent Pollution From Ships (APPS)
- ▶ Federal Water Pollution Control Act (FWPCA)
- ▶ Clean Water Act (CWA)
- ▶ Outer Continental Shelf Lands Act Amendments
- ▶ Coastal Zone Management Act
- ▶ Magnuson-Stevens Fisheries Act
- ▶ Deep Water Port Act 1974
- ▶ Trans-Alaska Pipeline Authorization Act
- ▶ Refuse Act
- ▶ Migratory Bird Act
- ▶ Marine Sanctuary Act
- ▶ Federal Ballast Water Management Act
- ▶ Hazardous Materials Transportation Act

U.S. Federal Laws

- ▶ **False Statements or Entries Act. 18 USC 1001**
- ▶ **Felony Obstruction of Justice. 18 USC 1505.**
- ▶ **Felony Witness Tampering. 18 USC 1512.**
- ▶ **Felony Destruction, Alteration and Falsification of Records... 18 USC 1519**
- ▶ **Conspiracy. 18 USC 371.**
- ▶ **Retaliation Against Informants. 18 USC 1513**
- ▶ **Minimum Alternative Fines Act.**

Who Is The Government's Target?



But We Didn't Approve The Misconduct

“ A chain is only as strong
as its weakest link.”

Kingley December 1, 1856

*“A company is no better
than its worst employee”*

Doctrine of “Respondeat Superior”

“Under principles of corporate liability and respondeat superior, as these principles apply in this case, and despite a corporate defendant’s stated policies to the contrary, a corporate defendant is liable for the actions of its agents and employees.”

New York Central and Hudson River R.R. v. United States, 212 U.S. 481, 495 (1909); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979); United States v. Hilton Hotels Corporation, 467 F.2d 1000, 1004-07 (9th Cir. 1972).



Plea Agreement
25 September 2005

"Cheating and deceiving is no way to conduct business...."

"In order to protect our waters and maintain fair competition, the Coast Guard will continue to focus enforcement actions toward those who intentionally pollute and deliberately lie to the United States authorities to conceal their criminal behavior."

Rear Admiral Thomas H. Gilmour
Assistant Commandant
Marine Safety, Security and
Environmental Protection
April 4, 2005

"This guilty plea sends a clear and strong message to shipping companies: they will pay a heavy price if they intentionally violate our nation's environmental laws."

Thomas V. Skinner
Acting Asst. Administrator
Environmental Protection Agency
Office of Enforcement and
Compliance Assurance.

April 4, 2005

Real World Enforcement: USCG

- ▶ **USCG has become extremely knowledgeable**
- ▶ **Aggressive interrogation of crew**
- ▶ **Seizure of original documents and logs**
- ▶ **Immediate notification/involvement of DOJ**
- ▶ **USCG COTP orders detention 33 USC 1908(e)**
- ▶ **Demand for Security in form of Bond/LOU for Criminal and Civil Liabilities**
- ▶ **Additional Agreement on Security**
- ▶ **Proof by Class that OWS operates properly**
- ▶ **Possible ISM Audit required**
- ▶ **Assignment of Points against PSC Boarding Matrix**

Real World Enforcement: DOJ

- ▶ **Expect immediate Grand Jury Subpoenas**
 - For Documents and records (very broad)
 - Crew testimony (cost of lodging, travel, retention)
- ▶ **Expect Fleet wide investigation and boardings**
- ▶ **Focus on Managers, Owners, Charterers**
- ▶ **Pressure to be fully transparent & cooperative**
- ▶ **ECP audit reviews: 2nd generation of cases**
- ▶ **Responsible Corp Officers Doctrine**

Responsible Corporate Officer

- ▶ Criminal liability imposed on corporate managers or officers
 - in a position to know and prevent a violation
 - even if they did not commit the alleged violation
- ▶ Can be held liable if person has authority to influence the corporate conduct which led to violation
- ▶ “Turning a willful blind eye”



Compliance Programs & Self Reporting

- ▶ DOJ's Thompson Memo
- ▶ EPA Self Reporting Program
- ▶ Coast Guard Self Reporting Program
- ▶ California EPA Voluntary Disclosure Program

Thompson Factors

- ? The nature & seriousness of the offense;
- ? Was the wrongdoing pervasive;
- ? Is there a history of similar misconduct;
- ? Was there timely and voluntary disclosure and a willingness to cooperate with the government;



DOJ's Definition of Cooperation

- ▶ Thompson Memo
- ▶ McCullum Memo
- ▶ McNulty Memo
- ▶ Senator Arlen Specter
- ▶ The New And Improved Memo

The New And Improved Memo

- Can't punish for appointment of counsel for employees
 - ▶ United States v. KPMG (Jeffry Stein)
 - Dismissal of the Indictment
 - ▶ New Policy Issued Same Day As Ruling

The New And Improved Memo

- Can't request audit report if prepared by or for counsel.
- Can't ask for waiver of attorney-client privilege.
- Counsel can once again take notes and write reports!

DOJ Policy

- ▶ Cooperation does not equal immunity
- ▶ You may still be prosecuted
- ▶ With the very evidence you provide

Self Reporting

- ▶ EPA Self Reporting Program
- ▶ Coast Guard Self Reporting Program
- ▶ California Voluntary Disclosure Program

On December 22, 1995 the US EPA issued a Policy titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations."

If all of the requirements of the Policy are met an entity may be eligible for elimination of the "gravity" component of an environmental penalty;

A recommendation from EPA against pursuit of criminal enforcement; and

To the extent the violations were discovered as the result of an environmental audit, EPA will refrain from requesting a copy of the audit report.

The Benefit

- ▶ EPA will waive 100% of gravity-based penalties if you meet all nine requirements.
- ▶ EPA will waive 75% of gravity-based penalties who meet all of the requirements except the requirement that the disclosed violation be discovered through an environmental audit or compliance management system.
- ▶ Still have to pay the “economic benefit component.”

Requirements

1) Systemic Discovery

- ▶ Must be found through audit program

2) Voluntary Disclosure

- ▶ Cannot be done in response to legal reporting requirement

3) Prompt Response

- ▶ Must fully disclose within 21 days

4) Independent Discovery & Disclosure

- ▶ Cannot be done to head off whistleblower

More Requirements

5) Correction and Remediation

- ▶ Must correct within 60 days

6) Prevention of Recurring Violations

- ▶ Must agree to take steps to prevent future violations

7) No Repeat Violations

- ▶ Cannot be a repeat of a past violation (3 years)

8) No serious harm or loss of life

9) Cooperation



US Coast Guard

On November 14, 2007, the US Coast Guard issued its Environmental Crimes Voluntary Disclosure Policy.

The Policy largely mirrors the EPA's Audit Policy.

BEST PRACTICES



Company wide audit.

Retention Policies.

Retention Policy Audits.

Use Preservation Letters.

Protect The Attorney/Client Privilege.

Is Your Compliance Program Targeting the Right Issue?



10 BRITANNIA NEWS

JUNE 2007

It was a dark and stormy night...

We are very grateful to Marc Greenberg and Glen Piper of Keesal, Young & Logan in Long Beach for this article about a case they recently handled for a Britannia Member.

Setting the scene

Many a horror story begins with 'it was a dark and stormy night'. In this case, it really

security guard were missing and presumed dead. Windows were blown out in homes as far as six miles away.

The explosion of the *SS SANSINENA* hastened an initiative at IMCO (now IMO) which by late 1977 required all tank vessels over 20,000 gt to have Inert Gas Systems (IGS). These systems

The current case

Like the *M/T PROBO ELK*, the tanker that arrived at Los Angeles in October was carrying refined petroleum products consisting of Jet Fuel A, Kerosene and Diesel. The oxygen levels were almost 14% – well in excess of the permissible maximum of 8%. However, instead of responding with a

MARITIME MIDNIGHT DUMPERS

Crisis in Maritime Environmental Compliance



Criminal Enforcement of Environmental Laws
American Law Institute/American Bar Association
October 4, 2007
Washington, D.C.

Defiance of MARPOL Regime

- ▶ MARPOL based on presumption that vessel owners and operators will make good faith efforts to ensure compliance
- ▶ Annex I in force for 23 years and Annex V in force for 19 years.

But:

- ▶ Epidemic of cases involving intentional MARPOL violations
 - Bypassing or disabling of pollution prevention equipment
 - Falsification of vessel records to conceal intentional illegal discharges
- ▶ Cases in United States involve criminal charges for -
 - Intentional discharge of waste oil, sludge, plastics and other pollutants
 - False statements, obstruction, destruction of evidence and witness tampering in United States ports



Each of these vessels was ISM certified and had passed Class, Flag and Port State inspections.

Recent Enforcement in United States

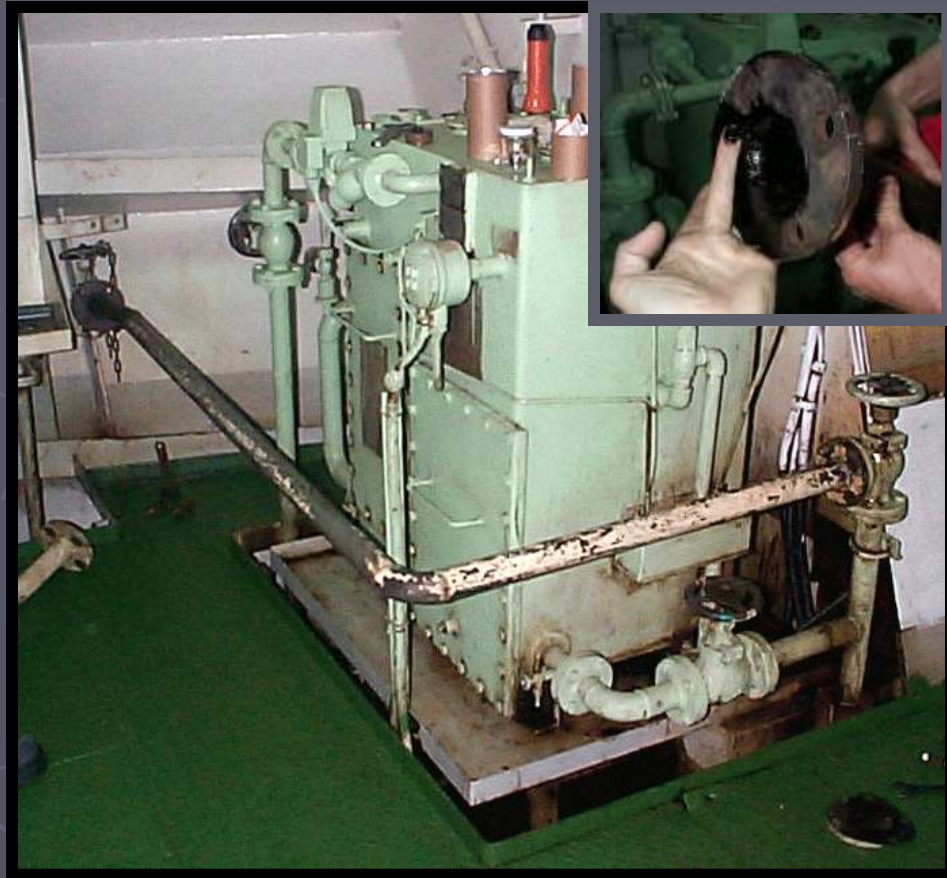
- ▶ All types of commercial vessels
- ▶ United States and foreign flag
- ▶ Since 1998 -
 - Over \$200 million dollars in corporate criminal penalties
 - Hundreds of vessels operating under court-supervised ECPs
 - Individuals sentenced to over 23 years incarceration



Nature of Deficiency

- ▶ Commercial shipping industry compares unfavorably to most United States shore-based industries with respect to management of environmental compliance
- ▶ Absence of waste stream analysis and volumetric data
- ▶ Failure to invest in adequate technology
- ▶ Failure of shore-side accountability for environmental compliance
- ▶ Failure of ISM and SMS procedures
- ▶ Failure of Class, Flag State and Port State certification and inspection procedures
- ▶ Crimes committed for financial motives
- ▶ Companies have not dedicated necessary personnel or financial resources to achieve and sustain compliance

Absence of Shore-side Accountability



Garbage Log



RECORD OF GARBAGE DISCHARGES 59/120

Approved by : R.G. Bushong

Garbage Categories

1. Plastic
2. Floating dunnage, lining, or packing materials
3. Ground paper products, rags, glass, metal, bottles, crockery, etc.
4. Paper products, rags, glass, metal, bottles, crockery, etc.
5. Food waste
6. Incinerator ash

* REFER TO PAGE 7, SECTION 9 FOR FURTHER DETAILS

Date/Time	Position of the Ship	Estimated Amount Discharged into Sea (M ³)					Estimated Amount Discharged to Reception Facilities or to other ship (M ³)		Estimated Amount Incinerated (M ³)	Certification Signature
		CAT.2	CAT.3	CAT.4	CAT.5	CAT.6	CAT.1	Other		
13.03.01 22.00	P. PIRAEUS 39°52'2"N	-	-	-	-	-	-	-	-	[Signature]
14.03.01 01.40	014°00'2"E	-	-	-	0.2	-	-	-	-	
15.03.01	P. LIVORNO	-	-	-	-	-	-	-	-	[Signature]
16.03.01	SPAIN	-	-	-	-	-	-	-	-	
17.03.01 18.00	P. VALENCIA 39°31'2"N	-	-	-	-	-	0.3	0.1	-	[Signature]
18.03.01	007°36'2"E	-	-	-	0.3	-	-	-	-	

United States v. Overseas Shipholding Group, Inc.

- ▶ \$37 Million criminal penalty
- ▶ Extensive environmental compliance plan for world-wide fleet for three years probation



Toward a Resolution

Coast Guard and Department of Justice

- ▶ Conduct fair, even-handed inspections and investigations
- ▶ Seek to minimize disruption to vessels' schedules
- ▶ Expedite investigations and evaluation of evidence
- ▶ Recognize good faith efforts to ensure compliance and voluntarily disclose violations
- ▶ Respect rights of witnesses, subjects, targets and defendants
- ▶ Clearly articulate policies guiding exercise of discretion
- ▶ Seek to ensure that policies are applied consistently

Toward a Resolution

Vessel Owners and Operators

- ▶ Need to change corporate culture
 - Must understand and address motives of shipboard personnel who commit violations and shore based officials who direct, condone or ignore it
- ▶ Need to integrate environmental compliance as priority matter into strategic business plan
- ▶ Corporate leadership must convince every shipboard officer, non-rated crew members and all shore side managers that environmental compliance is a real and permanent priority of organization
- ▶ Voluntarily report violations detected
- ▶ Cooperate fully and candidly with inspections and investigations



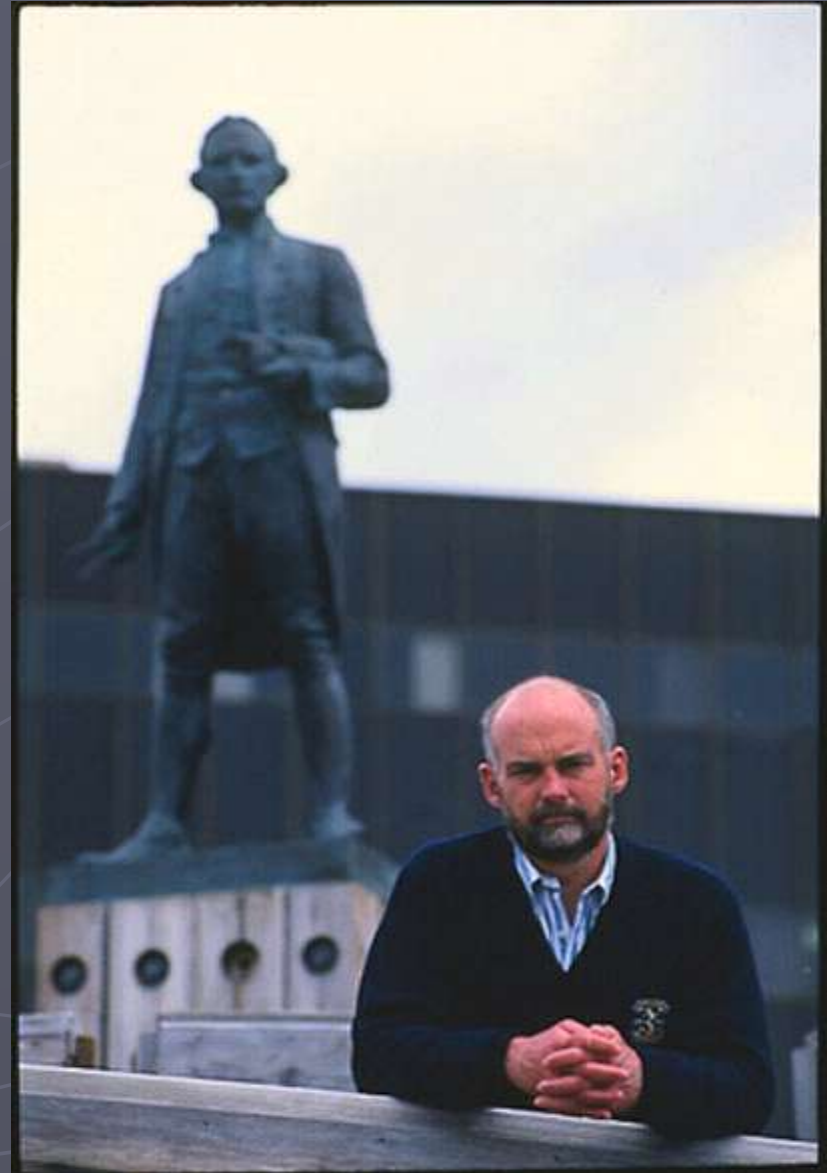
CAPTAIN JOSEPH HAZELWOOD

Criminal Trial

Guilty of negligent discharge of oil
Sentenced to 1,000 hours of
community service
Fined \$50,000

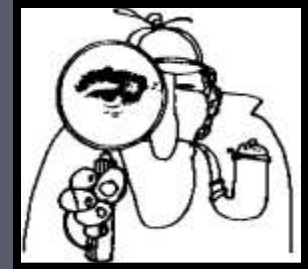
Civil Trial

Ordered to pay \$5,000 USD in
punitive damages
to fisherman



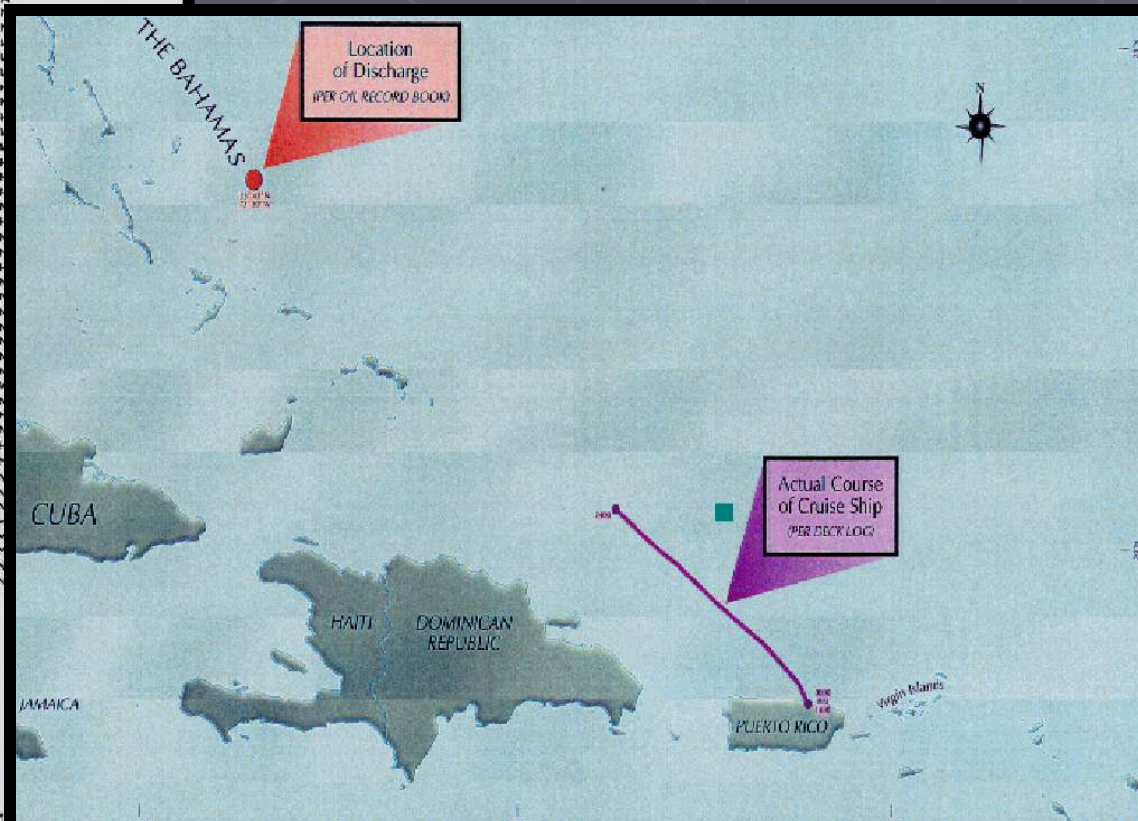
US Investigative Tools

- ▶ Analysis of OWS operability.
- ▶ Analysis of OWS maintenance history.
- ▶ Analysis of waste disposal records.
- ▶ Analysis of Oil Record Books.
- ▶ Records comparison.
- ▶ Analysis of incinerator capacity.
- ▶ Analysis of incinerator log.
- ▶ Interview of crew members.
- ▶ Review of audit reports.
- ▶ Review of enforcement history.



Records Comparison

94.09.1R	02.29.41	AW004	AF4,S,A FW HEATER TEMP.....3591	TNR
94.09.1R	02.30.44	AY111	AFS CYL .1 EXH.GAS DEV.....TEMP	RETURN
94.09.1R	02.31.35	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	HTRH
94.09.1R	02.33.14	I R039	RTI RF FEED WATER TANK P.....504R	HTRH
94.09.1R	02.33.32	I R074	FW TANK 1 SR LEVFI HH.....5850	AI ARM
94.09.1R	02.33.56	AY01R	AFS EXH.GAS RTI RF DIT.TEMP.3100	RETURN
94.09.1R	02.35.04	AV111	AFS CYL .1 EXH.GAS DEV.....TEMP	HTRH
94.09.1R	02.35.04	AV114	AFS CYL .A EXH.GAS DEV.....TEMP	I NR
94.09.1R	02.35.24	AV114	AFS CYL .4 EXH.GAS DEV.....TEMP	I NR
94.09.1R	02.35.48	I R039	RTI RF FEED WATER TANK P.....504R	RETURN
94.09.1R	02.36.44	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	RETURN
94.09.1R	02.42.13	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	HTRH
94.09.1R	02.42.27	FW011	CHI OR LEVFI UPPER FW SYSTEM.4729	I NR
94.09.1R	02.43.56	AW00R	AF4,S,A FW HEATER TEMP.....3591	I NR
94.09.1R	02.44.04	AY111	AFS CYL .1 EXH.GAS DEV.....TEMP	TNR
94.09.1R	02.44.04	AY114	AFS CYL .4 EXH.GAS DEV.....TEMP	TNR
94.09.1R	02.44.04	AY114	AFS CYL .A EXH.GAS DEV.....TEMP	TNR
94.09.1R	02.44.26	AW00R	AF4,S,A FW HEATER TEMP.....3591	RETURN
94.09.1R	02.48.20	AY01R	AFS EXH.GAS RTI RF DIT.TEMP.3100	TNR
94.09.1R	02.50.17	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	RETURN
94.09.1R	02.54.11	FW044	ED SEPARATORS RIJDF TANK.....3301	AI ARM
94.09.1R	02.56.11	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	HTRH
94.09.1R	02.57.34	FW044	ED SEPARATORS RIJDF TANK.....3301	RETURN
94.09.1R	03.01.28	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	HTRH
94.09.1R	03.05.25	AW00R	PARR.PNDI FTII .PUMP 2 PRESS.474A	RETURN
94.09.1R	03.09.00	I R074	FW TANK 1 SR LEVFI HH.....5850	RETURN
94.09.1R	03.13.12	FW041	LOWER RANT.FW HEATER TEMP..3730	RETURN
94.09.1R	03.18.55	AW007	PARR.PNDI FTII .PUMP 1 PRESS.474R	RETURN
94.09.1R	03.21.11	AW019	STEAM EVAPORATOR SR FATH IRF.A44A	RETURN
94.09.1R	03.22.25	AW007	PARR.PNDI FTII .PUMP 1 PRESS.474R	I NR
94.09.1R	03.25.52	AW007	PARR.PNDI FTII .PUMP 1 PRESS.474R	RETURN
94.09.1R	03.26.26	AW012	STEAM EVAPORATOR SR FATH IRF.A44A	AI ARM
94.09.1R	03.36.46	AW019	STEAM EVAPORATOR SR FATH IRF.A44A	RETURN
94.09.1R	03.39.58	I R026	FW TANK 2 C SR LEVFI.....5803	HTRH
94.09.1R	03.43.1A	AW019	STEAM EVAPORATOR SR FATH IRF.A44A	AI ARM
94.09.1R	03.47.1A	RT007	PUMP ROOM 3.....5395	RETURN
94.09.1R	03.49.50	I R079	FW TANK 2 C P. LEVFI HH.....5855	RETURN
94.09.1R	03.50.32	RT013	PUMP ROOM A SR.....5389	RETURN
94.09.1R	03.52.2A	I R039	RTI RF W.TANK 2 P. LEVFI.....5349	HTRH
94.09.1R	03.52.52	I R074	FW TANK 1 SR LEVFI HH.....5850	AI ARM
94.09.1R	03.52.59	I R079	FW TANK 2 C P. LEVFI HH.....5855	AI ARM
94.09.1R	03.53.0A	AW019	STEAM EVAPORATOR SR FATH IRF.A44A	RETURN
94.09.1R	03.54.44	AW022	DET PARR.PNDI LEVFI LOW.....	RETURN
AL ARM I OR.....				
94.09.1R	03.55.47	RT013	PUMP ROOM A SR.....5389	AI ARM
94.09.1R	03.56.42	I R084	FW TANK 4 SR LEVFI HH.....5860	AI ARM
94.09.1R	03.59.13	I R039	RTI RF FEED WATER TANK P.....504R	HTRH
94.09.1R	04.01.3A	I R039	RTI RF FEED WATER TANK P.....504R	RETURN
94.09.1R	04.02.07	I R084	FW TANK 4 SR LEVFI HH.....5860	RETURN
94.09.1R	04.03.18	AW011	AFS CYL .1 EXH.GAS DEV.....TEMP	HTRH



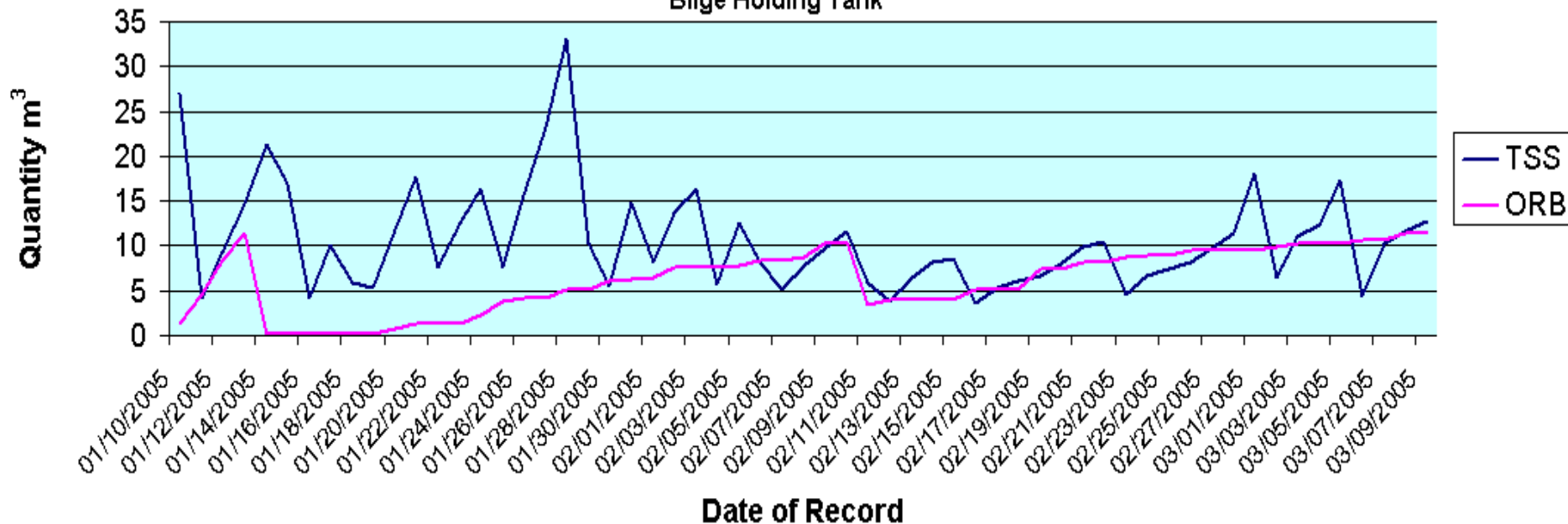
Oil Record Book vs. Bridge Log

Alarm Printout



Records Comparison

Comparison of Records
Tank Sounding Sheets vs. Oil Record Book Entries
Bilge Holding Tank



What You Should Do

- ✓ Insist on Compliance
- ✓ Be Truthful in Logs and Conversations
- ✓ Avoid Unnecessary Suspicion
- ✓ Beware of “Routine” MARPOL Inspections
- ✓ Take Affirmative Steps
- ✓ Implement Audit Procedures to Verify
- ✓ Be Truthful at All Times!



Safety First





When someone offers a carrot and stick, they offer an incentive to do something combined with the threat of punishment.



The Stick

- ▶ Government prosecutors have a hammer.
- ▶ If the problem requires a hammer - they will use the hammer.
- ▶ If the problem requires a wrench - they will use the hammer.



Debarment





The only difference between being in jail and being on a ship
is the opportunity to drown.

Mark Twain